

## COPYRIGHT OFFICE

### Copyright Office Appendix for FY 18 Annual Report

This appendix summarizes some of the key activities taken by the United States Copyright Office in FY 2018.

#### **Enactment of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (P.L. 115-264)**

Congress passed the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (MMA) in late September 2018, and the President signed it into law on October 11, 2018. As President Trump explained, this “landmark legislation” – which had bipartisan sponsorship and was unanimously passed by both the Senate and the House – “provides critical updates to copyright law to reflect the realities of music licensing in the digital age and to better reward artists and producers for the online use of their music.”<sup>17</sup>

Congress explained the need and background of this legislation as follows:

The United States’ copyright laws have helped make this nation the center of the music world. Copyright laws protect creators and artists, allowing them to thrive by granting them exclusive rights and protections to their works. However, the law has not kept pace with the music industry to reflect changes in consumer preferences and technological developments. The current statutory scheme applies inconsistent rules that place certain technologies at a disadvantage and result in inequitable compensation variances for music creators. These inconsistencies have drawn criticism that music copyright and licensing laws are too difficult to comply with and do not adequately reward the artists and professionals responsible for creating American music. To address these issues, multiple bills were introduced in the Senate and House of Representatives. Songwriters, artists, publishers, producers, distributors, and other stakeholders involved in the creation and distribution of music collaborated with legislators in both the Senate and the House to find a path forward on music reform. Legislative options were discussed with copyright experts and the Copyright Office. Hearings and briefings were held on music licensing reform and multiple bills were introduced.<sup>18</sup>

To summarize, the following is a description of what the three titles of the MMA accomplish (this description is based on the discussion of the MMA that is on the Copyright Office’s website at <https://www.copyright.gov/music-modernization/>):

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<sup>17</sup> Statement by the President on signing H.R. 1551, the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (October 11, 2018) at <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-7/>.

<sup>18</sup> S. Rep. No. 115-339, at 1-2 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of the Senate and House Judiciary Committees, at 1 (2018); *see also* H.R. Rep. No. 115-651, at 2 (2018) (detailing the House Judiciary Committee’s effort to review music copyright laws).

- Title I of the MMA is the Musical Works Modernization Act. Among other things, Title I modifies the existing section 115 “mechanical” license for reproduction and distribution of musical works in phonorecords (which was previously obtained by licensees on a per-work, song-by-song basis) to establish a new blanket license for digital music providers to engage in specific covered activities (namely, permanent downloads, limited downloads, and interactive streaming). Licensing of physical configurations (*e.g.*, CDs, vinyl) will still operate on a per-work, individual song license, basis. Title I establishes a market-oriented “willing buyer, willing seller” rate standard that will apply to all licensees of musical works under the section 115 mechanical license. Pursuant to section 115(d)(3), as amended, the Register of Copyrights will designate an entity as the mechanical licensing collective to administer the blanket license and distribute collected royalties to songwriters and music publishers. The newly created mechanical licensing collective will be tasked with developing and maintaining a database of musical works and sound recordings, which will be publicly available and is expected to become the most comprehensive database in the music industry. There will be a transition period to move to the new blanket license, allowing digital music providers to limit copyright infringement liability so long as the provider engages in good-faith, commercially reasonable efforts to identify and locate musical work copyright owners. The legislation also modifies the process for selecting federal district court judges to adjudicate rate-setting disputes regarding performance rights organizations that are subject to consent decrees with the Department of Justice (*i.e.*, ASCAP and BMI).
- Title II of the MMA is the Classics Protection and Access Act. Among other things, Title II brings pre-1972 sound recordings partially into the federal copyright system by extending remedies for copyright infringement to owners of sound recordings fixed before February 15, 1972. The federal remedies for unauthorized use of pre-1972 sound recordings shall be available for 95 years after first publication of the recording, ending on December 31 of that year, subject to certain additional periods. These periods provide varying additional protection for pre-1972 sound recordings, based on when the sound recording was first published. This section applies a statutory licensing regime similar to that which applies to post-1972 sound recordings, *e.g.*, the statutory licenses for noninteractive digital streaming services — such as internet radio, satellite radio, and cable TV music services. It also establishes a process for lawfully engaging in noncommercial uses of pre-1972 sound recordings that are not being commercially exploited. The legislation also applies certain existing title 17 limitations on exclusive rights and limitations on liability to uses of pre-1972 sound recordings, *e.g.*, sections 107 (fair use), 108 (libraries and archives), 109 (first sale), 110 (certain public performances), 112(f) (certain ephemeral copies) and 512 (safe harbor provisions for online service providers).
- Title III of the MMA is the Allocation for Music Producers (“AMP”) Act. Among other things, Title III will allow music producers to receive compensation from royalties collected for uses of sound recordings under the section 114 statutory license by codifying a process wherein the collective designated to collect and distribute royalties (currently, Sound Exchange) will distribute royalty payments to a producer under a “letter of direction.”

For years, the Copyright Office has worked on issues related to music reform. In 2011, the Office issued its report, *Federal Copyright Protection for Pre-1972 Sound Recordings*, which examined the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction. In 2015, the Office completed its comprehensive study of the music licensing framework and the evolving needs of creators in the twenty-first century, and published its report, *Copyright and the Music Marketplace*. The Copyright Office is heartened by the passage of this landmark legislation expected to benefit the many stakeholders across all aspects of the music marketplace, including songwriters, publishers, artists, record labels, digital services, libraries, and the public at large.

The Office has started work on various rulemaking endeavors related to the MMA and is conducting public outreach and educational activities regarding the changes made by the MMA. For more on the MMA and the Office's implementation of the new law, see <https://www.copyright.gov/music-modernization/>.

### **Studies and Reports**

The Office has maintained its commitment to transparency by ensuring that all members of the copyright community – including copyright owners, technology companies, consumers, public interest groups, academics, and the general public – have robust opportunities to participate and contribute to the Office's policy studies, reports, and recommendations. In addition, the Office continued to perform its work in administering the Copyright Act by examining and registering hundreds of thousands of copyright claims and recording documents and administering statutory licenses. The Office also worked with Congressional committees and staff on copyright legislation, provided expert advice to the federal courts and executive branch agencies on domestic and international copyright matters, and offered public outreach during FY18. Please visit [www.copyright.gov](http://www.copyright.gov) for more information.

During FY 2018, the Office continued its work on a number of active studies.

- **Visual Works**. The Office continued its work on a study on how certain visual works – particularly photographs, graphic artworks, and illustrations – are monetized, enforced, and registered under the Copyright Act. In April 2015, the Office published a *Federal Register* request for public comments. As the notice explained, the Office is specifically interested in the current marketplace for these visual works, as well as observations regarding the real or potential obstacles that these creators and, as applicable, their licensees or other representatives face when navigating the digital landscape. In addition, the Office is interested in the perspectives of copyright owners and users of these creative works. The Office is continuing its review of these issues into FY 2019. For information on this work, see <https://www.copyright.gov/policy/visualworks/>.
- **Moral Rights of Attribution and Integrity**. During FY 2018, the Office continued its work on a study on how existing U.S. law (including provisions found in Title 17 of the U.S. Code and other federal and state laws) protects the moral rights of attribution and integrity and whether any additional protection is advisable in this area. As part of this study, the Office in January 2017 published a *Federal Register* request for two rounds of

public comment. In response, the Office received 62 written submissions. The Office continued its review of the issues, conducted additional research, and is in the process of finalizing a written report for Congress, which will be released in FY 2019. For information on this study, see <https://www.copyright.gov/policy/moralrights/>.

- **The DMCA Safe Harbor Provisions (17 U.S.C. Section 512)**. The Office published a *Federal Register* notice in December 2015, requesting public comments on a study to evaluate the impact and effectiveness of the safe harbor provisions contained in section 512 of Title 17 of the U.S. Code. Section 512 established a system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet-based services. The section 512 study is evaluating the current impact and effectiveness of the Copyright Act's notice-and-takedown system and safe harbor provisions.

In response to the request for comments, the Office received more than 92,000 written comments, filed by a variety of stakeholders, including large and small creators, service providers, users, civil society, and academics. In addition, the Office held two days of public roundtables (in San Francisco and New York) and heard from over 130 participants. In November 2016, the Office sought further input through a second round of public comments as well as a request for empirical studies.

During FY 2018, the Office continued its work on this study to evaluate the impact and effectiveness of the safe harbor provisions contained in section 512 of Title 17 of the U.S. Code. Among other issues, the Office is considering the costs and burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and the general public. The Office is also reviewing how successfully section 512 addresses online infringement and protects against improper takedown notices. For information on this study, see <https://www.copyright.gov/policy/section512/>.

## **Rulemakings**

During FY 2018, the Office engaged in a number of rulemaking matters. A list of both open and closed rulemakings is available at <https://www.copyright.gov/rulemaking/>. An illustrative list appears below.

- **Seventh Triennial Rulemaking Proceeding under the DMCA**. On June 30, 2017, the Office initiated the seventh triennial rulemaking proceeding under the Digital Millennium Copyright Act (DMCA), which provides that the Librarian of Congress, upon the recommendation of the Register of Copyrights, may adopt temporary exemptions to section 1201's prohibition against circumvention of technological measures that control access to copyrighted works. In accordance with the statute, the Librarian's determination to grant an exemption is based upon the recommendation of the Register of Copyrights, who also consults with the National Telecommunications and Information Administration (NTIA) of the Department of Commerce. The ultimate goal of the proceeding is to determine whether there are particular classes of works as to which users

are, or are likely to be in the next three years, adversely affected in their ability to make non-infringing uses due to the prohibition on circumventing access controls.

As outlined in its June 2017 notice of inquiry (NOI), which launched the seventh triennial rulemaking, the Office established a new, streamlined procedure for consideration of requests to renew exemptions that were granted during the sixth triennial rulemaking. Many of the regulatory recommendations in the Office's June 2017 report, *The Section 1201 Study*, were reflected in the NOI.

In October 2017, the Office issued a notice of proposed rulemaking (NPRM). As discussed in the October NPRM, the Office reviewed all renewal petitions and related comments and concluded that, for each existing regulatory exemption, it had received a sufficient petition to renew that exemption and received no meaningful opposition to renewal. Accordingly, the Office indicated that it intends to recommend re-adoption of all existing exemptions.

The NPRM also outlined 12 classes for new or expanded exemptions that the Office had identified in response to public petitions, all of which are described in greater detail in the notice. The Office then initiated three rounds of public comment on those classes of exemptions. In the first round of comments, the Office sought legal and evidentiary submissions from parties who support the adoption of a proposed exemption, as well as parties that neither support nor oppose an exemption but seek to share pertinent information about a proposal. In the second round, responsive legal and evidentiary submissions from those who oppose the adoption of a proposed exemption were submitted. In the third round, written reply comments from supporters of a proposed exemption and parties that neither support nor oppose a proposed exemption were submitted. The Office held public hearings concerning the proposed exemptions; attorneys from both the Copyright Office and NTIA took part in April 2018 hearings held in Washington, D.C. (four days) and Los Angeles (three days).

Following the hearings, the Office issued a series of post-hearing questions to participants in various classes and, as promised by the NPRM, issued further guidelines for *ex parte* communications should a non-governmental participant seek to communicate with the Office. During the post-hearing phase of the proceedings, the Office consulted with NTIA and the Acting Register provided her recommendation to the Librarian of Congress regarding recommendations for new exemptions.

The Acting Register's recommendation and the final rule issued by the Librarian were published in the *Federal Register* on October 26, 2018. Additional information, including frequently asked questions, is available at <https://www.copyright.gov/1201/2018/>. The exemptions adopted in this rulemaking are effective October 28, 2018, and remain effective until the completion of the new rulemaking in 2021. More information about section 1201 is available at <https://www.copyright.gov/1201/>, which contains helpful resources, such as video tutorials, the Office's recent policy study on section 1201, and links to prior rulemaking proceedings.

- **Fee Study.** On May 24, 2018, the Office issued a notice of proposed rulemaking regarding the adoption of a new fee schedule. Congress authorized the Register to set and adjust Copyright Office fees that are fair, equitable, and give due consideration to the objectives of the copyright system. The Office adjusts its fees every three to five years, after first conducting a study of the actual cost to the Office of providing its fee-based services. The Office initiated a new cost study in June 2017, and based on its outcome, proposed the fee schedule described in the notice of proposed rulemaking. In addition, the Office provided the economic model used to craft the fee schedule, based on the findings of the cost study. Though the Office does not seek to achieve full cost-recovery, the proposed fees aim to recover a significant portion of the costs the Office incurs for providing fee-based services. The Office provided an opportunity to the public to comment on the proposed changes before it submits the fee schedule to Congress; 158 substantive public comments were received by the September 21, 2018 deadline. This docket is available at <https://www.copyright.gov/rulemaking/feestudy2018/>.
- **DART royalty payments.** After soliciting public comments in July 2018, the Office adopted a final rule to streamline the administration of digital audio recording technology (DART) royalty accounts and electronic royalty payments processes. This rule is intended to improve the efficiency of the Copyright Office’s Licensing Division operations and simplify royalty payment procedures for filers; it becomes effective November 14, 2018.

During FY 2018, the Office also issued final regulations on the following subjects:

- Group registration of newspapers;
- Group registration of photographs;
- Deposit requirements for literary monographs; and
- Fees for recording documents with electronic title lists.

### **The Compendium of U.S. Copyright Office Practices**

The Office continues to maintain updates to its office practices. During FY 2017, the Office conducted a comprehensive review of its *Compendium of U.S. Copyright Office Practices*, Third Edition, which is the administrative manual for registration and recordation practices of the U.S. Copyright Office. On September 29, 2017, the Office released the latest version of the *Compendium*, which is available at <https://www.copyright.gov/comp3/>. A complete list of the sections that have been added, amended, revised, or removed in this release, as well as a set of redlines prepared by the Office (which provides a direct comparison between the current version and the 2014 version), is at <https://www.copyright.gov/comp3/revisions.html>. The 2017 update included revisions to twenty-one sections of the *Compendium*. It also provides preliminary guidance for claims involving useful articles based on the Supreme Court’s March 2017 decision in *Star Athletica v. Varsity Brands*.

During FY 2018, the Office continued its work to review numerous revisions. The Office is finalizing its work on another update on the *Compendium* which it intends to release for public comment in FY 2019. For updates, see <https://www.copyright.gov/comp3>.

### **The Fair Use Index**

The Office hosts and maintains the Fair Use Index, a searchable database of notable cases from U.S. courts that comment on fair use law, which was undertaken in coordination with the Intellectual Property Enforcement Coordinator. As of September 2018, the index contains more than 200 cases. The Index is continually updated to keep practitioners and the public informed of new or prominent issues in fair use law, the application of fair use to a variety of types of works, and the law across appellate jurisdictions in the United States. The Index contains clear and concise language describing the facts and outcome of each case, making the Index accessible to the general public and providing valuable information – including a full legal citation – to aid a viewer in further research. The Fair Use Index is hosted at <https://www.copyright.gov/fair-use/index.html>.

### **International Capacity Building and Training**

Throughout the year, the Office continued to provide outreach and education regarding copyright issues to foreign visitors. The Office also hosted international visitors to discuss and exchange information on the U.S. copyright system and significant international copyright issues. The Office works with other agencies, including the State Department and the USPTO, to participate in meetings organized by those agencies, or to have visitors in those programs meet with the Office directly. In February 2018, a senior attorney from the Copyright Office participated in a program organized by the IP Attaché Office in Bangkok, giving a presentation to 50 officers, lecturers, practitioners and university students.

- **International Copyright Institute.** Every two years, the Office and World Intellectual Property Organization (WIPO) co-host the week-long International Copyright Institute, a symposium held in Washington, D.C.; it is one of the Office’s premier training events. Held on June 4-8, 2018, the ICI program was titled, “Copyright and Cross-Border Issues for Developing Countries and Countries with Economies in Transition.” Copyright officials from 17 countries heard from over 50 experts on topics ranging from copyright registration systems in the twenty-first century to inter-governmental coordination on criminal enforcement across borders. The program agenda is posted at <https://www.copyright.gov/international-issues/ici-2018.html>.